

CBSJTAYS

Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

11 Cr. 310 PGG

5 JAVEL TAYLOR,

6 Defendant.

7 -----x

9 November 28, 2012
10 11:15 a.m.

11
12 Before:

13 HON. PAUL G. GARDEPHE,

14 District Judge

15
16 APPEARANCES

17
18 PREET BHARARA,
19 United States Attorney for the
20 Southern District of New York
21 RYAN P. POSCABLO,
22 Assistant United States Attorney

23 JOSHUA L. DRATEL,
24 LINDSAY A. LEWIS,
25 Attorneys for defendant Taylor

CBSJTAYS

Sentence

1 (In open court)

2 (Case called)

3 THE COURT: All right. This matter is on my calendar
4 for the purposes of sentencing. I have read the presentence
5 report, dated February 22nd, 2012. I have read Mr. Dratel's
6 June 25th, 2012 submission, his September 4th, 2012 reply
7 submission, along with letters from Mr. Taylor's family and Mr.
8 Taylor that was submitted at that time. I have also read the
9 government's August 21st, 2012 submission.

10 Mr. Dratel, have you read the presentence report and
11 its recommendation and discussed it with Mr. Taylor.

12 MR. DRATEL: Yes, I have.

13 THE COURT: Mr. Taylor, have you read the presentence
14 report, its recommendation and discussed it with Mr. Dratel?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Now, there have been some written
17 objections to the presentence report which I will address. Mr.
18 Dratel has objected to Paragraphs 9 through 11 of the
19 presentence report which discuss Mr. Taylor's commission of the
20 crimes for which he was convicted. I reject those objections
21 because it was my view that the evidence at trial fully
22 supports the factual assertions in Paragraphs 9 through 11 of
23 the presentence report.

24 Mr. Dratel has also objected to Paragraph 33, which
25 contains a discussion of Mr. Taylor's December 13th, 2007

CBSJTAYS

Sentence

1 conviction. As you know from my decision, I have included this
2 conviction for possession of a controlled substance with intent
3 to sell.

4 Are there any other objections to the factual portions
5 of the presentence report you want to make, Mr. Dratel?

6 MR. DRATEL: No, your Honor. The others have to do
7 with the career offender enhancement itself as well. They're
8 in my letter, so I don't need to repeat them.

9 THE COURT: Okay. Mr. Poscablo, does the government
10 have any objections to the factual portions of the presentence
11 report?

12 MR. POSCABLO: No, your Honor.

13 THE COURT: I hereby adopt the findings of fact set
14 forth in the presentence report.

15 Although I am not required to impose sentence in
16 accordance with the sentencing guidelines, I am required to
17 consider the recommended sentencing range under the guidelines.
18 Here the Probation Department determined that Mr. Taylor's base
19 offense level is 12 because the cocaine base amount
20 attributable to him is less than 1.4 grams,.

21 However, the Probation Department determined, pursuant
22 to Section 4B1.1 of the guidelines, that the defendant is a
23 career offender because:

24 One, he was at least 18 years of age at the time of
25 the instant offenses;

CBSJTAYS

Sentence

1 Two, the instant offenses of conviction are felonies
2 that constitute controlled substance offenses; and

3 Three, the defendant had at least two prior felony
4 convictions in this case for controlled substance offenses.

5 Under Section 4B1.1 (b) of the guidelines, the
6 defendant's offense level is the greater of the levels set
7 forth in the table and Section 4B1.1 (b) or the otherwise
8 applicable offense level. Here the Probation Department
9 determined that Mr. Taylor's offense level is 34 because the
10 maximum penalty for the offenses of conviction is 30 years of
11 imprisonment.

12 The Probation Department further determined that Mr.
13 Taylor has a criminal history that yields a total of 8 criminal
14 history points, which would put him in Criminal History
15 Category IV. However, because Probation determined that Mr.
16 Taylor is a career offender under Section 4B1.1 (b), his
17 criminal history category is automatically Category VI.
18 Offense Level 34, at criminal history Category VI, yields a
19 guidelines range of 262 to 327 months imprisonment.

20 Now, the defense has objected to classification of Mr.
21 Taylor as a career offender. In particular, Mr. Dratel has
22 objected to Paragraphs 25, 38 and 80 of the presentence report
23 to the extent that these paragraphs treat or identify Mr.
24 Taylor as a career offender. As you know, I have rejected Mr.
25 Dratel's arguments with respect to the career offender

CBSJTAYS

Sentence

1 classification. Accordingly, I will overrule his objections to
2 the presentence report to the extent that they are based on the
3 classification of Mr. Taylor as a career offender.

4 Mr. Dratel, are there any other objections you want to
5 make with respect to the accuracy of the guidelines
6 calculations in the presentence report?

7 MR. DRATEL: No, your Honor.

8 THE COURT: Does the government have any objections?

9 MR. DRATEL: May I just, because the sentencing law
10 has evolved in some way, just to state the objection based on
11 the Court's opinion; in other words, just to state the
12 objection?

13 THE COURT: Go ahead.

14 MR. DRATEL: Just that we continue our objection to
15 the career offender classification.

16 THE COURT: All right. Mr. Poscablo, does the
17 government have any objections to the accuracy of the
18 guidelines calculation in the presentence report?

19 MR. POSCABLO: It does not, your Honor.

20 THE COURT: Based on my independent evaluation of the
21 sentencing guidelines as well as the opinion I issued earlier
22 this morning discussing why I believe that Mr. Taylor is a
23 career offender under sentencing guidelines, I am accepting the
24 calculations set forth in the presentence report.

25 Accordingly, I find that the applicable offense level

CBSJTAYS

Sentence

1 is 34, the criminal history category is VI, and the applicable
2 guidelines range is 262 to 327 months imprisonment.

3 Mr. Dratel, I'll hear from you as to an appropriate
4 sentence.

5 MR. DRATEL: Thank your Honor.

6 I know that the court has read the submission, so I
7 will not go through them in detail. I will try to concentrate
8 on what I think are the important principles in the context of
9 sentencing. I also wanted to note Mr. Taylor's sister is here.
10 There are other family members who could not make it because of
11 work schedules, but they continue to support Mr. Taylor and
12 visit him on a regular basis, so family support is still
13 intact.

14 I think I want to start and end in the same place
15 which is called the parsimony clause in 3553 (a), sufficient
16 but not greater than necessary. That is what the sentence
17 should be, and the factors mitigate substantially from the
18 guidelines range so that the guideline range really represents
19 an extreme, is not appropriate here and not even close to
20 appropriate here in terms of the sentence that will be
21 sufficient but not greater than necessary.

22 Just to start off with one of the technical parts is
23 just a departure in the sense the court is permitted to depart
24 one level for the criminal history category, from Level 6 to
25 Level 5, this statutory restriction in terms of how far you can

CBSJTAYS

Sentence

1 go on a departure for overstating the nature of the criminal
2 history. In the context of the analysis of the career
3 offender, the convictions that form the basis for career
4 offender guideline and also rather the classification and also
5 the nature of those offenses, their terms of being what would
6 be considered at least in the federal context and even in the
7 state context as relatively minor drug offenses, that one-level
8 departure is appropriate as a threshold issue even before we
9 get to 3553 (a).

10 3553 (a), I think the important factors, there are
11 several. One I think is very important is the concept of the
12 type of guideline that the career offender guideline represents
13 which is not a guideline based on empirical data collected by
14 the Sentencing Commission as to where along the range of that
15 vertical axis a sentence should fall and where, it is a number
16 essentially picked out of the air.

17 In the Dorvy case which we briefed extensively in the
18 papers establishes that in the context of a different
19 guideline, but I think the analogy is right on point in the
20 sense that you have a guideline that does not reflect that
21 empirical data like other guidelines do.

22 On one hand, it doesn't necessarily give the court the
23 kind of guidance those other guidelines do, that this would be
24 something that somehow is reflective of where sentences are,
25 have been and ought to be.

CBSJTAYS

Sentence

1 The second part is that consistent with the Supreme
2 Court and Second Circuit obviously following that, Kimbrough
3 and Gall and the Second Circuit following is that it is the
4 type of guideline that the court is free to disregard in terms
5 of not as a totality in terms of calculating the guidelines,
6 but in terms of where the sentence falls.

7 THE COURT: Let me ask you this. We have somebody who
8 has four prior drug offenses including three felonies,
9 convicted of two additional drug felony convictions in this
10 case. The career offender provision would appear to be
11 designed in part to address somebody who has committed
12 repeatedly drug trafficking crimes and has shown an
13 unwillingness to abide by the law such that it is necessary to
14 take him out of the community for a very extended period of
15 time.

16 Wouldn't you agree that appears to be the logic of it?

17 MR. DRATEL: I think that is an abstract logic of it,
18 but in the context of where those guidelines fall, I think that
19 the considered judgment of the courts across the country, 65
20 percent in 2010 were sentencing below the career offender
21 guidelines. The considered judgment of courts addressing that
22 have found that to be way too high to achieve that goal, and if
23 you look at sufficient but not greater than necessary, I agree
24 with the court in the context of what you have to look at. To
25 me it is a question of projecting in the future to say what is

CBSJTAYS

Sentence

1 it that is needed to achieve that goal, whether it is a career
2 offender goal or guideline goal in general.

3 THE COURT: Let me address that because what you have
4 said is that it is your belief that a sentence within the range
5 of 21 to 27 months would be adequate to meet all the objectives
6 of sentencing. My question for you in that regard is your
7 client received a sentence of 42 months in December of 2007,
8 and he served a significant period of incarceration, I think it
9 was 25 months on that sentence, was released on parole, 10 days
10 later was arrested on another drug case.

11 So given that backdrop, how could you possibly suggest
12 to me that it is rational for me to conclude that a sentence of
13 21 to 27 months would be adequate to address the need for
14 deterrence as well as the safety of the community? Isn't there
15 a track record? He was given a significant sentence, he served
16 the sentence, was released on parole, 10 days later arrested on
17 another drug case, six months later arrested in this case. How
18 could I possibly conclude that 21 months is enough to deter him
19 in the future?

20 MR. DRATEL: I will try to answer that two ways.

21 One is with respect to the 21 to 27, this is a
22 different type of case for Mr. Taylor. It is his first
23 experience with federal court. I think there is a dramatic
24 difference in defendants' approach to cases, to sentencing, to
25 the future in the context of their experience in federal court.

CBSJTAYS

Sentence

1 Their experience in the MCC for the length of time he
2 has been in there, what he sees what happens to people who get
3 caught up in the federal system, I think it has been a
4 significant lesson, one we had never had before. I think his
5 letter reflects a lot of introspection and self-reflection that
6 had not occurred before.

7 I think that oftentimes in these situations there is a
8 revolving door aspect of it in state court that doesn't
9 necessarily address long-term issues. I think that the gravity
10 of the potential sentence in this case, the gravity of the
11 nature of federal court in general has had a salutary effect in
12 that with regard for Mr. Taylor, for his family and for the
13 recognition that this could be -- this is a life-changing event
14 either way. Whatever the court sentences Mr. Taylor to, this
15 is a life-altering event, whether it is for the length of time
16 the court thinks is reasonable for the purposes of sentencing
17 or for the 21 to 27 month range that we're urging.

18 Either way it is a life-altering effect for him. I
19 think that even, and there is no -- I concede that there is a
20 sentence above 27 months that is reasonable. To me part of
21 that, what I am trying to present today is that reasonable
22 sentence does not go nearly as high in the stratospheric
23 numbers the guidelines would confer. There is a range that is
24 reasonable, obviously, between there.

25 I think, though, it is much further down, much closer

CBSJTAYS

Sentence

1 to 27 months than it is to 262. If you look at what he would
2 get in the state court even, obviously that is a reflection of
3 the seriousness of offense. These are NYPD officers who made
4 the arrest. These are NYPD officers who processed him and
5 questioned him, these are NYPD officers who turned him over to
6 the federal system. If you look at the state system where it
7 is between 2 to 12 with shock treatment, with shock -- when I
8 say "shock treatment," S H O, S H O C K, treatment of the
9 sentence, the program in the state system, he got early
10 release.

11 Those are the kind of things I think are of extreme
12 importance. I think say reasonable minds can differ as to the
13 actual sentence as to what might be adequate. I know Mr.
14 Taylor now since the beginning of the case and I find a marked
15 change in his maturity level, his recognition of his situation
16 in that his chances for leading a productive life are down to,
17 they whittle down to in one sense what happens here today and
18 what happens when he is done with what happens here today. I
19 think that has had a significant effect on him.

20 That is essentially all I can say after that issue. I
21 don't know if the court has any further questions about that
22 particular. That is where I come out on that.

23 THE COURT: All right.

24 MR. DRATEL: There are also cases, and we put them in
25 our papers, that talk about the nature of prior records like

CBSJTAYS

Sentence

1 Mr. Taylor's and very much the type that your Honor described.
2 The Moreland case in particular and others that still try to
3 find a medium that is rational and still achieves the goals of
4 sentencing sufficient but not greater than necessary that are
5 actually far closer to the guidelines that the defendant would
6 face than the career offender guidelines that the defendant
7 would face.

8 Obviously, that is another factor. The deterrence
9 purpose of the career offender guidelines does not require 262
10 months or anything close to that. Projecting into the future,
11 if the court thinks of what level of sentence would achieve
12 what the court wants to achieve at sentencing and what the
13 statute wants the court to achieve at the sentencing, I think
14 262 months is off the charts and a fraction of that will
15 suffice.

16 I want to dovetail that in the context of Mr. Taylor's
17 personal background which has its difficulties, many of which
18 have been unattended either by himself or by the system as a
19 whole, and he does not put the blame on the system in that
20 regard.

21 He acknowledges his own inability to take advantage of
22 the things that were offered to him in his life through family
23 and elsewhere, but the fact is that he does fall into that
24 category. The kind of guidelines the presentence report
25 cavalierly in a certain sense recommends are not going to

CBSJTAYS

Sentence

1 change that. Something much shorter than that will be able to
2 do that. If you talk about programming and things that are
3 available in a custodial setting, I have seen almost in all
4 instances people like Mr. Taylor almost universally a far
5 shorter term of incarceration is sufficient to allow people
6 that time to find the maturation and to find their place in the
7 world where they can be a law-abiding citizen and productive
8 citizen with a family and young child who has not really had a
9 chance to -- were born while he was in prison.

10 Those are tragic circumstances, very human
11 circumstances, and I think they do factor into sentencing
12 particularly when you look at the distribution of sentences in
13 these kinds of cases where 65 percent are below the career
14 offender guidelines, where 70 percent of the cases in this
15 district as a whole are effectively below the guidelines. We
16 went through the numbers and we did that in our reply.

17 In this district it is actually fewer are attributable
18 to 5K that as a percentage than anywhere in the country. It is
19 judges exercising their discretion under 3553 (a) and taking
20 the mandate of sufficient but not greater than necessary, of
21 looking at the four elements of sentencing and the seven
22 factors.

23 When I say the elements, you know, the punishment,
24 deterrence, rehabilitation, incapacitation, that those four
25 plus the seven factors plus the parsimony clause, taking those

CBSJTAYS

Sentence

1 together, you find sentences well below the guidelines, and
2 sentences below the guidelines, I think here that's what is
3 appropriate.

4 THE COURT: All right. Mr. Taylor, is there anything
5 you want to say before the court imposes sentence?

6 THE DEFENDANT: Your Honor, I just want to say on
7 behalf of Mr. Dratel and Ms. Lewis, I want to thank them for
8 defending me to the best of their ability and I want to say
9 what is done is done.

10 THE COURT: I am sorry? I can't hear you.

11 THE DEFENDANT: I want to think Mr. Dratel and Ms.
12 Lewis for defending me to the best of their ability. I am not
13 disputing my past history. We all know. I just want to say I
14 apologize, and like my lawyer said, Mr. Dratel has said, I
15 did -- I am a little nervous. Excuse me.

16 THE COURT: You take as long as you need.

17 Let me tell you what I would like to hear from you,
18 and that is why should I believe it is going to be any
19 different this time. You have been sentenced now -- this is
20 your fifth sentencing. You haven't gotten the message up till
21 now. Mr. Dratel says you matured a lot, but the fundamental
22 question is why should I believe it is going to be any
23 different this time given what has happened in the past?

24 THE DEFENDANT: Your Honor, I realize what it is, I
25 focus on which is my family, my daughter, my son, and I can't

CBSJTAYS

Sentence

1 keep putting them through this because I would be selfish if I
2 keep putting them through this.

3 I realize now I know what it is I have to do to make a
4 difference, and I will. If I get sentenced to lesser time, it
5 is not my decision, but I will change because I know what I
6 have to do in the future to make a difference, and I will. I
7 read a lot. I have a lot of time to myself, and what don't
8 kill me will make me stronger.

9 Like I said, I been reading a lot lately, and a lot of
10 time I do, I do know, like I said, I do know and I take blame
11 and responsibility for what I have done in the past, and the
12 only thing I can say now is that what is done is done. If, if
13 the court is -- I would like to get out there and make a
14 difference. There is a lot of things I want to do as far as
15 going back to school and obtaining my GED and taking on
16 business administration. I set aside the constantly put
17 negativity before anything. Like I said, I am done because I
18 can't go, if I come through this again, I will be being selfish
19 to my family, and they've been supporters to me through --
20 since day one, since all my kids, I can't keep putting them
21 through this.

22 That is all I want to say. I apologize and I beg
23 thank you for hearing me and thank my lawyers defending me to
24 the best of their ability.

25 THE COURT: Mr. Dratel, what is the status of the

CBSJTAYS

Sentence

1 state case?

2 MR. DRATEL: I think they're still in pretrial context
3 and I have been in contact with the state lawyer. I guess
4 they're also waiting to see what happens here.

5 THE COURT: All right. You may be seated.

6 Mr. Poscablo, is there anything you want to say on
7 behalf of the government?

8 MR. POSCABLO: Your Honor, I think that the government
9 put in, as the court knows, we put in a submission that I think
10 lays out the government's position in regards to what would be
11 an appropriate sentence in this case. I think we made it clear
12 that the career offender guidelines we think, at least our
13 position is it is specifically aimed at individuals like this
14 defendant in this case who has a history of chronic drug
15 dealing in particular.

16 Unless the court has any further questions for the
17 government, we'll rest on our papers.

18 THE COURT: In deciding upon an appropriate sentence,
19 I have considered all of the factors listed in 18 United States
20 Code Section 3553 (a), including the nature and circumstances
21 of Mr. Taylor's offense, his personal history and
22 characteristics, the need for the sentence imposed to reflect
23 the seriousness of the offense, to promote respect for the law,
24 to provide just punishment and to afford adequate deterrence.

25 Beginning with the nature and circumstances of the

CBSJTAYS

Sentence

1 offense, the case involves a crack cocaine transaction in the
2 Frederick Douglas Houses in the Upper West Side of Manhattan.
3 After a three-day trial, the jury convicted Mr. Taylor of
4 conspiring to distribute, and possess with intent to
5 distribute, crack cocaine as well as the substantive offense of
6 distribution, and possession with intent to distribute crack
7 cocaine.

8 I will briefly summarize the evidence at trial. On
9 March 21st, 2011, an undercover officer posing as a crack
10 cocaine user approached Mr. Taylor's co-conspirator, Leonard
11 Fitzgerald, on West 103rd Street between Broadway and Amsterdam
12 Avenue and asked him to contact an individual who went by the
13 nickname Jay.

14 The government contends that this is the defendant's
15 nickname. Fitzgerald said he knew Jay from the projects. A
16 reasonable jury could have found that Mr. Fitzgerald then
17 called Mr. Taylor and arranged for a sale of four dime bags of
18 crack cocaine.

19 After the call, the undercover officer gave Fitzgerald
20 \$40 in prerecorded buy money with which to purchase the crack
21 cocaine from Taylor. Police observed Fitzgerald meet Taylor,
22 and the two engaged in a short conversation before walking into
23 860 Columbus Avenue, a building in the Frederick Douglas
24 Houses.

25 A short time later Fitzgerald exited the building,

CBSJTAYS

Sentence

1 advised the undercover officer that he had obtained the crack.
2 Fitzgerald then gave the undercover officer four small ziplock
3 bags of crack cocaine. He was then arrested.

4 Shortly thereafter, police observed Taylor and another
5 man standing in front of 860 Columbus Avenue. Taylor was seen
6 handing the man, the other man, a clear bag containing small
7 dark-colored ziplock bags, the type of packaging associated
8 with crack cocaine. The other man tucked the bag into his shoe
9 or sock. The police approached the other man who fled
10 ultimately into Central Park. Police gave chase, but he was
11 not apprehended.

12 Mr. Taylor was arrested at the scene. Police searched
13 the jacket he was wearing, recovered \$45, including the \$40 in
14 prerecorded buy money that the undercover officer had provided
15 to Fitzgerald who purchased the crack cocaine.

16 After the trial, Mr. Taylor moved for a judgment of
17 acquittal on Count 1 and for a new trial on Count 2. I denied
18 that motion in its entirety. In my judgment, the evidence of
19 the defendant's guilt at trial was quite strong given the
20 police observations and Mr. Taylor's possession of the
21 prerecorded buy money.

22 With respect to Mr. Taylor's personal history and
23 characteristics, he is 25 years' old. Despite his relative
24 youth, he has a significant criminal record. He has, as I
25 indicated, four prior drug trafficking convictions, three

CBSJTAYS

Sentence

1 felonies and one misdemeanor. In 2006, at age 19, Mr. Taylor
2 was convicted of criminal possession of a narcotic in the
3 fourth degree and was sentenced to five years of probation.
4 Within three months he was convicted of criminal sale of a
5 controlled substance in the fourth degree and criminal
6 possession of a controlled substance in the third degree. On
7 the latter crime, he received a sentence of 42 months
8 imprisonment.

9 Within 10 days of being released on parole in 2010,
10 Mr. Taylor was arrested again and convicted shortly thereafter
11 for criminal possession of a controlled substance in the 7th
12 degree. About six months after serving his sentence on that
13 crime, he was arrested in this case.

14 Mr. Taylor currently faces a charge in New York County
15 Supreme Court of intentional murder. I should say that charge
16 has played no role in my sentencing determination because I
17 have no idea whether Mr. Taylor committed the crime. I will
18 say that at an earlier point in the proceedings it was brought
19 to my attention that the police targeted Mr. Taylor for this
20 undercover buy because they believed he had information about a
21 homicide. It now appears the police have switched from viewing
22 him as a witness to a perpetrator. As I have said, I have no
23 information as to whether or not he committed this murder; and,
24 therefore, this arrest and charge played no role in my
25 sentencing determination.

CBSJTAYS

Sentence

1 Mr. Taylor was born in New York and is one of 9
2 children. He had a difficult childhood. According to
3 Mr. Taylor's sister, he and his siblings were removed from
4 their mother's care when Mr. Taylor was three or four years'
5 old and placed in foster care due to abuse, neglect and their
6 mother's alcoholism. According to Mr. Taylor's sister, she and
7 most of her siblings were abused while in foster care. Mr.
8 Taylor and his siblings ultimately moved in with their
9 grandmother in the Frederick Douglas Houses. Mr. Taylor's
10 grandmother later died, which was a devastating event for him
11 as well as his siblings.

12 After the grandmother's death, Mr. Taylor moved in
13 with a godmother. However, the sister reports that Mr. Taylor
14 spent additional time in foster care as a teenager. It is
15 clear Mr. Taylor's childhood was unstable and a shuttle between
16 foster homes and homes of relatives. At the time of his
17 arrest, he was living with one of his sisters.

18 Mr. Taylor and his fiance have a daughter who was born
19 while Mr. Taylor was in custody on these offenses. He also has
20 a four-year old son from a prior relationship. Mr. Taylor has
21 a history of marijuana use which began when he was 11 years'
22 old, apparently smoked marijuana every other day. He dropped
23 out of school at 11th grade. He was a special education
24 student while in the school system. He was diagnosed with
25 attention deficit disorder and was prescribed medication for

CBSJTAYS

Sentence

1 that condition as well as certain behavioral problems.

2 Mr. Taylor was unemployed between 2005 and his arrest
3 on March 11th, 2011. Given his criminal record, it is a fair
4 inference that apart from periods of incarceration, he
5 supported himself through drug trafficking.

6 In determining Mr. Taylor's sentence, Section 3553 (a)
7 of Title 18 requires that I avoid unwarranted sentencing
8 disparities. In preparation for today's sentence, I have
9 obtained information from the Sentencing Commission concerning
10 the treatment of career offenders in this district, in this
11 circuit and throughout the country. My focus has been somewhat
12 different than the focus of the parties.

13 I have inquired not about the general rates of
14 departure or variance and not about the general rates of
15 departure or variance as to career offenders. What I was
16 particularly interested in was how defendants who are
17 classified as career offenders were treated when they had the
18 same base offense level as this particular defendant. These
19 statistics tell us how courts treat defendants who commit
20 relatively minor crimes, but because of their criminal record,
21 qualify as career offenders. This is what I found.

22 Nationwide, defendants with a base offense level of
23 12, which is the base offense level that applies here absent
24 application of the career offender provision, such defendants
25 who qualify as career offenders were sentenced below the range,

CBSJTAYS

Sentence

1 that is, below the range provided as a result of the career
2 offender provision more than 70 percent of the time.

3 In about 44 percent of all the cases, the government
4 had not sought a non-guideline sentence. The average reduction
5 with respect to these non-government sponsored reductions was
6 about 100 months imprisonment or about a 40 percent reduction
7 from the range provided for as a result of career offender.

8 I then looked nationwide at crack offenders who were
9 at base Offense Level 12 and who had a criminal history score,
10 range of between 7 and 9. In other words, I looked at
11 defendants with a record very similar to Mr. Taylor's.

12 Nationwide, 81 percent of the time these defendants
13 were sentenced below the range. About 55 percent of the time
14 this happened even though the government had not recommended a
15 reduction. The average reduction was 102 months in these
16 non-government sponsored reduction cases. That amounts to
17 about a 38 percent reduction.

18 I then looked at cases in the Second Circuit, again at
19 defendants who are at base Offense Level 12 who were
20 nonetheless career offenders. The numbers were small, but 75
21 percent of the time there was a non-guideline sentence. In all
22 of these cases the reduction was not sponsored by the
23 government. The average reduction was 86 months or about a 48
24 percent reduction.

25 I then looked at the Southern District of New York

CBSJTAYS

Sentence

1 again for defendants who would otherwise be at a base offense
2 level of 12. The numbers, of course, are even smaller, but in
3 100 percent of the cases there was a sentence below the range.
4 The average reduction was 52 months, which in those cases
5 amounted to an average reduction of 68 percent.

6 None of these cases involved a government-sponsored
7 reduction. These statistics tell me that judges nationwide, in
8 this circuit and in this district, have been extremely
9 reluctant to impose a career offender range on defendants with
10 a background similar to Mr. Taylors. Indeed, nationwide, in
11 this circuit and in this district, a majority of judges have
12 refused to do so.

13 As we all know, the guidelines here recommend a
14 sentence of between 262 and 327 months imprisonment. That is a
15 range of nearly 22 years to 27 years. The Probation Department
16 recommends a sentence of 262 months. The government seeks a
17 guideline sentence.

18 Defense counsel has argued that Mr. Taylor should not
19 be treated as a career offender and that instead he should be
20 sentenced in accordance with the range that would have been
21 applicable but for career offender status. That range is 21 to
22 27 months imprisonment.

23 I have considered whether a downward departure here is
24 appropriate, and I have decided I will not exercise my
25 discretion to grant a downward departure. The Second Circuit

CBSJTAYS

Sentence

1 has made clear that a downward departure is not warranted in
2 connection with a career offender merely because the defendant
3 is a street-level dealer, citing *United States versus Misho*, 241 F.3d 214, at 219 (2d Cir. 2009).

5 In that case the Second Circuit makes clear that there
6 is, "no generalized exception for street-level drug selling,"
7 with respect to the career offender provision. I have
8 considered Mr. Taylor's prior offenses, his role in those
9 offenses, the sentences that were previously imposed and the
10 amount of time he served and have concluded that a departure
11 based on these factors is not warranted.

12 I cannot say that a downward departure from career
13 offender treatment is appropriate for Mr. Taylor given his
14 commission of four prior drug trafficking crimes, including
15 three felonies and the circumstances of those offenses.

16 18 U.S. Code Section 3553 (a)(5) requires me to
17 consider any pertinent policy statements in the guidelines.
18 Section 4A1.3 (b)(1) is relevant in that regard. It provides,
19 and I quote:

20 "If reliable information indicates the defendant's
21 criminal history category substantially overrepresents the
22 seriousness of the defendant's criminal history or the
23 likelihood that the defendant will commit other crimes, a
24 downward departure may be warranted."

25 As Mr. Dratel has pointed out, Section 4A1.3 (b)(3)(A)

CBSJTAYS

Sentence

1 limits this directive by stating that, "the extent of a
2 downward departure under this subsection for a career offender
3 within the meaning of Section 4B1.1 may not exceed one criminal
4 history category."

5 I have concluded that no departure is warranted under
6 Section 4A1.3 (b) because I believe that Mr. Taylor presents an
7 extremely high risk of recidivism and that his criminal history
8 category does not substantially overrepresent the seriousness
9 of his criminal history. The record is abundantly clear that
10 Mr. Taylor has been selling crack in and around the Frederick
11 Douglas Houses for the past six years when he was not
12 incarcerated.

13 The prior prosecutions and convictions and even a
14 substantial term of imprisonment and court supervision in the
15 form of parole have not deterred him from going right back to
16 selling crack in the same area.

17 I also reject the notion that a street-level dealer
18 like Mr. Taylor has no substantial effect on the community. It
19 is people like Mr. Taylor who ruin public housing projects for
20 the majority of tenants who want to live and raise their
21 children in a safe, crime-free area, not in an illegal drug
22 marketplace. I conclude no departure under the guidelines is
23 appropriate.

24 I have also considered all of the other factors that
25 Mr. Dratel has put forth as a basis for a departure under the

CBSJTAYS

Sentence

1 guidelines, including Mr. Taylor's difficult childhood, the
2 effect of his incarceration on his children, the disparity in
3 penalties compared to the state system, the conditions at the
4 MCC. I conclude that none of these factors are so
5 extraordinary as to warrant a departure. Indeed, most if not
6 all of these arguments could and have been made on behalf of
7 many other defendants.

8 That brings me to whether a variance is appropriate,
9 an inquiry that requires me to consider all of the factors set
10 forth in 18 United States Code Section 3553 (a) and the
11 parsimony principle, that is, what is the least amount of
12 imprisonment that will serve all of the purposes of sentencing.

13 The government has asked me to impose a sentence of
14 between nearly 22 years and 27 years on a person aged 25 who
15 sold in this case less than 1.4 grams of crack and who has
16 never been convicted of selling a substantial amount of
17 narcotics. A sentence of between 22 and 27 years would be
18 longer than what many violent felonies receive. In my
19 judgment, a sentence within this range is wildly more than
20 necessary to serve all the purposes of sentencing and to
21 constitute a serious miscarriage of justice.

22 In my view, in a case that does not involve violence
23 or drug dealing on a large scale and in a case that involves a
24 relatively young man who has never served a period of
25 incarceration greater than about two years, much less a term of

CBSJTAYS

Sentence

1 imprisonment approaching the range at issue here, a judge must
2 think long and hard before taking away from such a defendant a
3 significant percentage of the rest of his life.

4 It is in my view a fair case that would justify such a
5 sentence. Such a sentence would be appropriate where a
6 defendant is beyond redemption, where there is no chance of
7 rehabilitation, where incarceration for decades is necessary to
8 protect the community because there is little or no chance that
9 the defendant will ever reform. There is no record here on
10 which I can base such a conclusion.

11 This man is 25 years' old. He has made a lot of bad
12 choices. He has been unwilling to abide by the law, but I
13 can't find, based on what he has done so far, it is necessary
14 to lock him away for the next 22 to 27 years either to achieve
15 deterrence or to protect the community.

16 It is equally clear to me a sentence between 21 and 27
17 months imprisonment is not appropriate. Such a sentence would
18 not address the defendant's repeated flouting of the law and
19 would not deter the defendant. As I noted in December 2007, he
20 was sentenced to 42 months in prison. That sentence had no
21 effect. 10 days after his release on parole, the defendant was
22 arrested on another drug crime. So it is obvious to me a
23 sentence between 21 and 27 months would not be effective, would
24 not serve all the purposes of Section 3553 (a), and then indeed
25 the sentence must be much longer than the 42 month sentence the

CBSJTAYS

Sentence

1 defendant received back in December 2007.

2 Only a sentence of that magnitude is likely to have
3 the deterrent effect necessary to persuade the defendant that
4 he will no longer be permitted to sell drugs in and around the
5 Frederick Douglas Houses. The sentence imposed has to be
6 sufficient to derail what has been persistent criminal
7 activity, interrupted only by occasional periods of
8 incarceration.

9 With these facts in mind, I will now describe the
10 sentence I intend to impose and ask the parties if they have
11 anything further they wish to say.

12 With respect to the imprisonment, I intend to impose
13 sentence of 84 months of imprisonment on each count of the
14 indictment to run concurrently. I conclude that this amount of
15 imprisonment is sufficient to satisfy all the purposes of
16 sentencing set forth in Section 3553 (a).

17 With respect to supervised release, I intend to impose
18 a sentence of six years on each count, to run concurrently. I
19 intend to impose the following mandatory conditions of
20 supervision: The defendant shall not commit another federal,
21 state or local crime, he shall not illegally possess a
22 controlled substance, he shall not possess a firearm or
23 destructive device, he shall cooperate in the collection of DNA
24 as directed by the probation officer. It is my intention to
25 suspend the mandatory drug testing condition in favor of

CBSJTAYS

Sentence

1 imposition of a special condition requiring drug treatment and
2 testing.

3 I intend to impose the first 13 standard conditions of
4 supervised release as well as the following special conditions:

5 The defendant will participate in a program approved
6 by the United States Probation Office to include testing to
7 determine whether he has reverted to the use of drugs. The
8 court authorizes the release of available drug treatment
9 evaluations and reports to the substance abuse provider as
10 approved by the probation officer.

11 The defendant shall participate in a mental health
12 program if deemed necessary and approved by the U.S. Probation
13 Office. He shall continue to take any prescribed medications
14 unless otherwise instructed by his health care provider. I
15 authorize the release of available psychological and
16 psychiatric evaluations and reports to the health care
17 provider.

18 The defendant shall submit his person, residence,
19 place of business, vehicle or any other premises under his
20 control to a search, on the basis the probation officer has a
21 reasonable belief that contraband or evidence of a violation of
22 the conditions of his release may be found. The search must be
23 conducted at a reasonable time and in a reasonable manner.
24 Failure to submit to a search may be grounds for revocation.
25 The defendant shall inform any other residents that the

CBSJTAYS

Sentence

1 premises may be subject to search pursuant to this condition.

2 The defendant is to report to the nearest Probation
3 Office within 72 hours of release from custody. I do not
4 intend to impose a fine because I find the defendant lacks the
5 ability to pay a fine. I am required to impose a \$200.00
6 special assessment.

7 Mr. Poscablo, is the government seeking an order of
8 forfeiture?

9 MR. POSCABLO: It is not, your Honor.

10 THE COURT: Mr. Dratel, anything further you wish to
11 say?

12 MR. DRATEL: If your Honor could recommend the RDAP
13 program, the Bureau of Prisons drug treatment program for Mr.
14 Taylor, as we requested in our papers, and also an institution
15 as close as possible given the Bureau of Prisons
16 considerations, close as possible to metropolitan area to
17 facilitate family visits.

18 THE COURT: All right. Mr. Taylor, anything further
19 your wish to say?

20 THE DEFENDANT: No, sir.

21 THE COURT: Mr. Poscablo, anything further from the
22 government?

23 MR. POSCABLO: No, your Honor.

24 THE COURT: Mr. Taylor, for the reasons I just stated,
25 it is the judgment of this Court you be sentenced to 84 months

CBSJTAYS

Sentence

1 imprisonment, six years of supervised release on each count to
2 run concurrently. You will be subject to the mandatory
3 standard and special conditions I just mentioned. You are
4 ordered to pay a special assessment in the amount of \$200.00.

5 After you serve your period of incarceration, you will
6 be released on supervised release and you will be subject to
7 the conditions I described. You should be aware if you violate
8 those conditions, you will be brought back before me for the
9 purposes of sentencing, and I can assure you now, and I want
10 you to remember for all time, that if I see you again and you
11 have violated the conditions of your release and in particular
12 if you have gone back to selling drugs, you can expect no mercy
13 from me. Do you understand me?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: I recommend to the Bureau of Prisons Mr.
16 Taylor be admitted to the residential drug and alcohol program.
17 Given Mr. Taylor's long-time use of marijuana, he has a
18 compelling need for drug treatment.

19 I further recommend to the Bureau of Prisons the
20 defendant be incarcerated as close as possible to the New York
21 Metropolitan Area so that he may maintain ties with his family
22 during this period of incarceration.

23 Mr. Taylor, I am required to advise you of your appeal
24 rights. You can appeal your conviction if you believe that
25 your guilty plea was unlawful or involuntary or if there was

CBSJTAYS

Sentence

1 some other fundamental defect in the proceedings that was not
2 waived by your guilty plea. You also have a statutory right to
3 appeal your sentence under certain circumstances. With few
4 exceptions, any notice of appeal must be filed within 10 days
5 of judgment being entered in your case.

6 Judgment will likely be entered tomorrow. Mr. Dratel
7 will discuss with you whether or not you wish to file a notice
8 of appeal. If you're not able to pay the costs of an appeal,
9 you may apply for leave to appeal in forma pauperis. If you
10 request, the Clerk of the Court will prepare and file a notice
11 of appeal on your behalf.

12 Is there anything further?

13 MR. POSCABLO: Not from the government.

14 MR. DRATEL: No, your Honor.

15 THE COURT: I do want to say that representation of
16 Mr. Taylor I thought was quite extraordinary in the case. No
17 stone was left unturned either at trial or during the
18 sentencing phase. It is my judgment that no lawyer, I should
19 say today, no lawyers could have done more for Mr. Taylor than
20 has been done here and that counsel performed at a very high
21 professional level throughout.

22 We are adjourned.

23 (Court adjourned)
24
25